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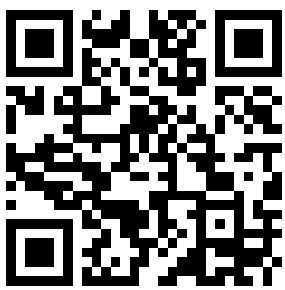

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4TH CIVIL NO. 20384

IN THE COURT OF APPEAL

FOURTH APPELLATE DISTRICT

STATE OF CALIFORNIA

EDISON B. SCHROEDER,

Plaintiff and Appellant,

vs.

EDUTRONICS OF CALIFORNIA, INC., etc., et al.,

Defendants and Respondents.

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
HONORABLE JAMES K. TURNER, JUDGE

APPELLANT'S OPENING BRIEF

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4TH CIVIL NO. 20384

COURT OF APPEAL

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

EDISON B. SCHROEDER,

Plaintiff and Appellant,

vs.

EDUTRONICS OF CALIFORNIA, INC., etc., et al.,

Defendants and Respondents.

APPELLANT'S OPENING BRIEF

PROCEEDINGS BELOW

Appellant filed a Complaint in the Superior Court of the State of California for the County of Orange, for damages resulting from the breach of an Employment Contract [C.T. 1]. The case was heard before the HONORABLE JAMES K. TURNER, sitting without a jury. Trial proceedings were held on December 8, 1977 and again on January 24, 1978. At the conclusion of the trial each party filed written arguments. On April 5, 1978 a Minute Order was entered, granting judgment in favor of Respondents. On April 7, 1978 Appellant served and forwarded for filing a

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Request for Findings of Fact and Conclusions of Law [C.T. 62-63]. On April 13, 1978 the Court entered an order instructing Respondents to prepare and submit Findings of Fact and Conclusions of Law. Respondents did submit proposed Findings of Fact and Conclusions of Law on April 26, 1978 [C.T. 64-67], which for some unexplainable reason were not actually filed until June 2, 1978. However, the Findings of Fact and Conclusions of Law were never signed by the Court [C.T. 66]. On June 5, 1978 the Court did sign the Judgment in Respondents' favor [C.T. 68-69]. Appellant has appealed from the entire of the Judgment.

STATEMENT OF FACTS

The Respondent EDUTRONICS OF CALIFORNIA, INC., was engated in the business of producing educational films, consisting of both audio and visual, for use primarily in the computer industry. Through a series of various mergers EDUTRONICS OF CALIFORNIA, INC., became merged into the other Corporations which are Respondents in this action. For purposes of brevity, the Respondents will be collectively referred to herein as "EDUTRONICS".

In 1978 Appellant entered into an Employment Agreement with EDUTRONICS [Exhibit 1], wherein Appellant was employed as Vice President. The term of the Employment Agreement covered the period from March 1, 1968 through January 31, 1973. The agreed upon rate of salary was $25,200.00 per year from March 1, 1968 through January 31, 1970, and $30,000.00 per year from February 1, 1970 through January 31, 1973.

Appellant and ALLEN J. SHAFRAN were the original

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organizers of EDUTRONICS. MR. SHAFRAN, who appeared at the trial as a witness, testified that throughout the course of his employment the Appellant was somewhat of an "eccentric", in the sense that he was extremely capable and creative, and that he exhibited unusual work habits in that he did not maintain regular office hours and did much of his work at home [Dec. R.T. 34-38]. RICHARD RODNICK also testified regarding the Appellant's unusual ability and unusual work habits [Dec. R.T. 41-43]. Both MR. SHAFRAN and MR. RODNICK, who had been key people with EDUTRONICS, acknowledged that the work product of Appellant was superior, notwithstanding his unusual work habits. In fact, the testimony establishes that MR. SCHROEDER had originated every single product of EDUTRONICS up through the date of his termination.

It was the Appellant's responsibility to conceive and write the initial rough scripts and visuals for the training programs, and to thereafter follow through and coordinate the actual production of the films and workbooks with other personnel within the company. Appellant was more creative when working at home and for that reason seldom performed his work in EDUTRONICS' offices [Dec. R.T. 12-16]. Such a procedure was quite acceptable to MR. SHAFRAN during the period that MR. SHAFRAN was the President of EDUTRONICS. MR. SHAFRAN left EDUTRONICS in 1969 [Dec. R.T. 35]. Appellant's Assistant at EDUTRONICS at all relevant times was MR. PATRICK PAGE [Jan. R.T. 2-3].

After MR. SHAFRAN left the organization EDUTRONICS was in a state of flux. MR. GEORGE A. HOWARD and MR. PATRICK SORRENTINO joined EDUTRONICS in early 1971. The later part of 1971 MR. HOWARD took over the production of the company. MR.

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HOWARD was unhappy with the way that Appellant performed his work, in the sense that Appellant did not maintain regular office hours and Appellant's work schedules were unpredictable. This resulted in the entering into of a Memorandum Agreement between Appellant and EDUTRONICS dated October 14, 1971 [Exhibit 2], wherein it is stated that the Appellant shall work out of his home. A schedule of production for the Appellant is further set forth in the Memorandum.

During the months of December, 1971 and January, 1972 EDUTRONICS terminated a large number of its employees, including its executive employees [Exhibit 15; Dec. R.T. 43-44]. MR. HOWARD was then named as the Executive Vice President and Chief Operating Officer of the Company. Some of the terminated employees had Employment Contracts similar to the Appellant's Employment Contract, and EDUTRONICS did not ever purport to terminate those employees for cause [Jan. R.T. 136]. According to MR. HOWARD, EDUTRONICS was going through "traumatic times" [Dec. R.T. 137].

On February 5, 1972 MR. HOWARD purported to terminate Appellant's employment, for cause [Exhibit 7]. Appellant's Complaint seeks damages for breach of the Employment Contract, in the form of salary and other fringe benefits accruing during the period from February 5, 1972 through the end of the contract period on December 31, 1973, in the approximate total sum of $30,000.00.

The alleged cause for termination was that Appellant was not performing in accordance with the work schedule which is attached to the October 14, 1971 Memorandum. The real reason

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for termination, according to Witness PATRICK PAGE (who is a completely unbiased witness who had first hand knowledge of the facts) was "that it was politicial conflict that MR. HOWARD wanted to gain complete control of production and development and felt that MR. SCHROEDER represented a threat" [Jan. R.T. 27].

ARGUMENT

I

EDUTRONICS HAS FAILED TO MEET ITS BURDEN OF PROOF OF SHOWING GOOD CAUSE FOR TERMINATION

In a wrongful discharge action it is only necessary for the employee to prove his employment, the amount of his salary, and that he was discharged before the end of the term of his employment agreement. It is not part of his case in chief to prove the reason assigned by the employer for the dismissal. Downs v. Sherry, 90 Cal. App. 2d. 1.

The burden is on the Respondent employer to show good cause for terminating the employee. Wise v. Southern Pacific Co., 1 Cal. App. 3d. 600.

The Appellant established a prima facia case at the time of trial. The Employment Agreement [Exhibit 1] shows that Appellant was entitled to continuous employment through the period ending January 31, 1973, at an annual salary of $30,000.00 per annum, plus vacation pay and fringe benefits. The evidence establishes that Appellant substantially performed all of the terms and provisions of his Employment Agreement.

The issue is whether or not EDUTRONICS met its burden of establishing good cause for termination of Appellant's employment on February 5, 1972. Appellant is aware that the

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Court of Appeal will not ordinarily weish the evidence and will usually imply that the evidence does support the judgment of the trial court. However, Code of Civil Procedure Section 634 provides that when written findings and conclusions are required, and the Court has not made such findings, it shall not be inferred on appeal that the trial court found in favor of the prevailing party as to the relevant facts or issues.

As a practical matter, Appellant did not discover that the trial court had not signed the proposed Findings of Fact and Conclusions of Law until receiving the Reporter's Transcript on the appeal of this case, and therefore had no opportunity to call the matter to the Court's attention in the form of a motion under Code of Civil Procedure Section 657 or 663. Even if the trial court had signed the proposed Findings of Fact and Conclusions of Law, however, the proposed findings do not include any findings upon the crucial issue of this case, to wit, whether or not Appellant willfully breached any of the terms of his Employment Agreement. Further, Appellant contends that the evidence would not support a finding to the effect that Appellant willfully breached his Employment Agreement, even if such an expressed finding had been made. A necessary finding will not be implied unless clearly supported by the evidence. Beason v. Griff, 127 Cal. App. 2d. 382. Therefore, Appellant is entitled to have the record reviewed in order to determine if EDUTRONICS met its burden of proof in establishing that Appellant willfully breached his Employment Agreement.

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II

APPELLANT DID NOT WILLFULLY BREACH

THE EMPLOYMENT AGREEMENT

California Labor Code Section 2924 provides that an Employment Contract for a specified term may be terminated by the employer only in the event of a willful breach of duty, habitual neglect of duty, or continued incapacity of the employee to perform his duties.

An Employment Contract for a fixed period can be terminated only on the grounds enumerated in Labor Code Section 2924. Holdzendorff v. Housing Authority, 250 Cal. App. 2d. 596.

It is not every deviation by the employee from the standard of performance sought by his employer that will justify a discharge, but rather, there must be some willful act or willful misconduct when the employee uses his best efforts to serve the interest of his employer. Holdzendorff v. Housing Authority, Supra. A contract to give a Plaintiff steady employment for so long as his services are satisfactory is binding upon a defendant employer, and such a contract may be terminated only under conditions rendering it reasonably just and proper to do so, whether or not the employee's standard of performance is satisfactory to the employer. Seifert v. Arnold Bros., 138 Cal. App. 324.

EDUTRONICS' position is that Appellant breached his duty in that he did not perform the work set forth in the schedule attached to the October 14, 1971 Memorandum [Exhibit 2] within the time limits set forth in the Memorandum. The evidence, however, indicates that Appellant performed the work within and

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in advance of the time limit set forth in the schedule, and in particular, that Appellant did not willfully fail to perform any duties, even though there might have been a misunderstanding regarding the duties which Appellant was expected to perform.

Boiled down to its essentials, the dispute is over what was required of the Appellant under the schedule which is attached to the October 14, 1971 Memorandum. EDUTRONICS contends that the Schedule called for a whole new line of products, known as the 700 series products. EDUTRONICS further contends that the products produced by Appellant during the period in question were 800 series products, which were merely re-work of some old programs which had been purchased by EDUTRONICS at an earlier date [Dec. R.T. 111].

Appellant contends that there was no distinction between the 700 series products and the 800 series products, but in fact, they were all the same product for which different internal numbering was being used, and that Appellant diligently produced the products called for well in advance of the due date.

Appellant had completed the rough script and visuals for some of the products prior to the time of entering into the October 14, 1971 Memorandum. Thereafter, Appellant completed all of the remaining series that were required to be completed by him through the period February 5, 1972. Appellant was engaged full time on the products of EDUTRONICS during the period from October 14, 1971 through February 5, 1972. EDUTRONICS accepted the work produced by Appellant during that period of time and put the work into production. EDUTRONICS contends, however, that even though Appellant was engaged full time in

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doing what he was suppose to be doing, Appellant is in breach of his Employment Agreement because the ultimate product contains an 800 series number, whereas the schedule attached to the October 14, 1971 Memorandum pertains to 700 series product.

The truth lies only in the testimony of PATRICK PAGE. MR. PAGE testified that throughout the course of its production the 800 re-work series contained a 700 series number for internal work purposes. It was common to use one number for internal processing purposes and for MR. PAGE to assign the final number and product name before the products were put into actual production. In this case MR. PAGE testified that he finally assigned the names and numbers to these products on October 6, 1971 [Jan. R.T. 8-10]. Prior to that time the products had carried the names and numbers shown in the schedule attached to the October 14, 1971 Memorandum. MR. PAGE testified that the products which were ultimately produced under the names and numbers of the 800 series were in fact the same products which were initially internally produced under the name and numbers of the 700 series [Jan. R.T. 10-14].

According to MR. HOWARD the 700 series was to have been a brand new product which was to have been created for non-technical users. MR. HOWARD testified that the only persons who would know what the contents of the new 700 series product should consist of were the Appellant, MR. SORRENTINO and MR. PAGE, who comprised the Products Planning Committee [Dec. R.T. 138-146]. However, MR. PAGE never heard of such a new product that would bear a 700 series. On the contrary, MR. PAGE testified that all products of EDUTRONICS were capable of being used for both

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technical and non-technical people. Specifically, MR. PAGE pointed out that EDUTRONICS' catalog carried its products under two different sections, one purporting to offer the product to technical users and another one purporting to offer the same product to non-technical users [Exhibit 18]. The only inference to be drawn from the fact that neither Appellant nor MR. PAGE ever heard of this purported new product expounded by MR. HOWARD is that MR. HOWARD has completely fabricated the concept of a new product. MR. HOWARD obviously had to set forth some excuse for terminating Appellant's employment. MR. SORRENTINO was still employed by EDUTRONICS at the time of the trial and logically had to support the testimony of MR. HOWARD. It is obvious that MR. HOWARD seen the opportunity to distort the evidence by capitalizing upon the fact that the names and numbers set forth as an Exhibit to the October 14, 1971 Memorandum referred to 700 series products, whereas the final products are named and numbered as 800 series products. On the surface, the difference in names and numbers would tend to support MR. HOWARD'S testimony. The testimony of MR. PAGE, however, who is the person who had superior knowledge and is the person who actually assigned the numbers to the products, completely discredits MR. HOWARD'S testimony.

EDUTRONICS' entire defense was one of attempted deception. EDUTRONICS initially introduced a copyright purporting to show that the 800 series products were completed in May of 1971 [Exhibit C]. MR. SORRENTINO then backed off from that contention and admitted that the 800 series re-work were not completed until the later part of 1971 and the early part of 1972 [Jan. R.T. 30].

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The later explanation would appear to be correct, in that the application was not even filed with the copyright office until December 5, 1973, and the copies of the publications themselves were not filed at the Patent Office until February 4, 1974 [See second page of Exhibit C].

There is absolutely no evidence showing that Appellant willfully breached his duty, as is required by Labor Code Section 2924. Indeed, MR. HOWARD did not even know what the 700 series products were to consist of. MR. HOWARD admitted that the products were to consist of whatever Appellant might conceive [Dec. R.T. 141].

The record discloses that at all times right up through the day of his termination on February 5, 1972 the Appellant was busily engaged in fulling performing the tasks assigned to him [Jan. R.T. 17]. In the opinion of MR. PAGE, the Appellant was working competently [Jan. R.T. 28-30].

The evidence does establish a number of possible reasons for the Appellant's termination. Included among those are the economic problems which EDUTRONICS was experiencing and the political conflict which MR. HOWARD felt as pertained to the Appellant. The fact that EDUTRONICS terminated a number of other employees of similar stature to Appellant on or about the same time, without even attempting to establish a cause for termination, leads to the logical inference that Appellant was merely the next employee on the totem pole who was destined to be terminated.

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III

MITIGATION OF DAMAGES DEFENSE

WAS NOT ESTABLISHED

Since Findings of Fact and Conclusions of Law were not signed in this case is difficult to determine if the trial court considered mitigation of damages as a defense to the action. It is important to note, however, that the proposed findings of fact and conclusions of law make no reference whatsoever to the defense of mitigation of damages.

So as to dismiss any inference that the adverse judgment is based upon an inference of failure to mitigate damages, Appellant points out that the Employment Agreement [Exhibit 1] contains a restriction prohibiting Appellant from becoming employed by any competitor for a period of 18 months following the termination of his employment. The evidence establishes that from the date of his termination through the end of the Employment Agreement (January 31, 1973), Appellant was attempting to obtain employment. From March of 1972 through June of 1972 Appellant was back and forth to England attempting to obtain employment there, and was reimbursed only for his expenses. In August of 1972 Appellant received a $1,000.00 advance from a company known as ADVANCE SYSTEMS, and in September of 1972 Appellant received a $3,500.00 advance from STANDARD OIL COMPANY, each advance being against fees for specific projects which Appellant was retained to perform as an independent contractor. However, the evidence also establishes that Appellant incurred expenses in performing that work. There is no evidence that Appellant realized any profit out of the $4,500.00 sum which he

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collected during the period from February 5, 1972 through January 31, 1973 [Dec. R.T. 64-73].

If a discharged employee enters into self-employment, his damages for breach of the Employment Contract are reduced only by the amount of actual profits earned by him as a self-employed person. Crillo v. Curtola, 91 Cal. App. 2d. 263. Since there is no evidence that Appellant actually earned any profit as a self-employed person during the period in question, EDUTRONICS is not entitled to any reduction in the form of mitigated damages.

IV

CONCLUSION

EDUTRONICS failed to meet its burden of proving that Appellant's employment was terminated because of the willful breach of the Employment Agreement by Appellant.

It is respectfully submitted that the Judgment should be reversed and the case should be remanded to the trial court for the entry of a judgment in favor of Appellant in such amount as the trial court determines is appropriate.

W. P. O'KEEFE, JR.

W. PATRICK O'KEEFE, JR.
Attorney for Appellant

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VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I, the undersigned, say:

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a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

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a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

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SUPREME COURT OF THE STATE OF CALIFORNIA, (7 copies), 3580 Wilshire Boulevard, Los Angeles, California 90010

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Executed on February 20, 19 79 at Santa Ana, California.
(check applicable paragraph below)

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Annette Metcalf
(Signature)
ANNETTE METCALF

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